Supreme Court, U.S.
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No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,
Petitioner

v.

ROBERT A. SCARDELLETTI, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF CHARLES C. YEOMANS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Charles C. Yeomans respectfully submits this brief as *amicus curiae* supporting the Petitioner, Robert J. Devlin.[1] The parties have granted consent to the filing of this brief.[2]

INTEREST OF *AMICUS CURIAE*

As a consumer, Yeomans has been a member of a number of settlement classes. In 2000, and for the first time, Yeomans participated in proceedings to consider a proposed settlement, of claims over a credit card issuer's practices. He appeared in federal court as an objector, testifying by affidavit to his inability to make a reasoned opt-out decision on the basis of the notice he received and opposing certification of the proposed class and aspects of the settlement plan disclosed in the notice. Yeomans did not move to intervene in the underlying litigation.[3] His objections, along with all other objections made, were overruled in the final judgment certifying a class for settlement purposes, approving the settlement agreement, releasing rights and claims that existed in favor of class members, and permanently enjoining class members from complaining about certain practices by the card issuer

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of the brief.

[2] Petitioner's consent is on file with the Clerk of the Court. The written consent of Respondent accompanies this brief.

[3] Other class members did move to intervene. The district court denied all such motions, noting that there was no function beyond that of an objector to be served by intervention. *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-75, slip op. at 9 (C.D. Cal. Sept. 29, 2000).

in the future.[4] The judgment thus simultaneously created a binding effect on Yeomans (through certification of the class) and prejudiced his existing and potential claims about the issuer's conduct.

Yeomans appealed to the Ninth Circuit for review of the final judgment; his appeal has been fully briefed and awaits scheduling of the oral argument. In their response briefs, the appellees contend that Yeomans cannot appeal the merits of the final judgment approving the settlement because he did not intervene in the proceedings below. Thus, although there are differences in context,[5] Yeomans's opponents ask the Ninth Circuit to decide as did the Fourth Circuit panel majority in refusing to accord appellate standing to Petitioner Devlin. *Scardelletti v. DeBarr*, 265 F.3d 195, 204-210 (4th Cir. 2001).

SUMMARY OF ARGUMENT

To date, the consistent practice of the Ninth Circuit has been to review the merits of class settlement decisions on appeal by a class member who made timely objections to that settlement. This practice is consistent with generally-applicable principles of appellate standing and affords due protection to class members who are named participants in the consideration of the proposed settlement. This Court should

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[4] Final Judgment and Order Granting Final Approval of Settlement, *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-75 (C.D. Cal. Oct. 17, 2000), *appeal docketed*, No. 00-56958 (9th Cir. Nov. 27, 2000).

[5] For example, Petitioner Devlin is a member of a defendant class preliminarily certified under Rule 23(b)(1) prior to settlement, *see Scardelletti*, 265 F.3d at 200-01; Yeomans is a member of a settlement-only plaintiff class certified under Rule 23(b)(3).

make the salutary practice of the Ninth Circuit the standard for all the Circuits.

ARGUMENT

Objecting Class Members Who Would Otherwise Be Bound By A Judgment Approving The Settlement Have Standing To Appeal.

To be accorded standing, appellants in the Ninth Circuit must show at least "a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995). An appellant must be aggrieved by the decision for which he seeks review, in order to satisfy Article III of the Constitution. *Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir. 1997). Nonparties typically do not have standing to initiate appeals because they are bystanders to the proceedings and not bound by the decisions. Most allowed appeals by nonparties thus are from situations in which the order or judgment purports to be conclusive against the appellants.[6] In limited circumstances, the Ninth Circuit will entertain an appeal from an affected (but not bound) nonparty who "participated in the district court proceedings" if the equities weigh in favor of hearing the appeal. *See Keith*, 118 F.3d at 1390 (preliminary injunction enforcing an ear-

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[6] *See, e.g., Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1546-47 (9th Cir. 1990) (nonparty had standing to appeal declaratory judgment entered against him); *Brown v. Board of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) (dismissed defendants were entitled to appeal specific relief granted against them).

lier settlement restrained parties from issuing permits to nonparty appellant).[7]

The Ninth Circuit applies these standing rules to class actions, whether complex or relatively simple, litigated or settlement-only. In *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir.), *cert. denied sub. nom. Hoffer v. City of Seattle*, 506 U.S. 953 (1992), the court considered a class settlement of a tangle of securities litigation on appeals by members of the certified groups of bond purchasers and groups of bondholders who were not class members. The bondholders' appeals were entertained on the principle that one "who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment without having intervened in the district court." *Id.* at 1277. In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), the court reviewed a number of challenges to a nationwide settlement class, including the appeal by a putative class member who had opted out and claimed that he had effectively opted out all other putative class members from Georgia. *See id.* at 1024-25. Usually, class members' appeals are reviewed on the merits

[7] The Ninth Circuit distinguished *Marino v. Ortiz*, 484 U.S. 301 (1988), by noting that the appellant "was haled into this action by the district court over his objections" on an order to show cause why the injunction should not issue. *Keith*, 118 F.3d at 1391 n.7. The injunction effectively countermanded injunctive relief the appellant had obtained in a state court action. *Id.* at 1389-90. In an earlier decision, *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe v. United States*, 440 U.S. 958 (1979), the Ninth Circuit treated a voluntary participant as if it were an intervenor, even though it never presented a formal motion to intervene.

with no more discussion of standing than the appellants' description as class members or objectors.[8]

Even without actual participation, an unnamed class member may be bound to the judgment with notice and an opportunity "to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).[9] If an unnamed class member remains absent from the consideration of a settlement, his silence is equally consistent with actual agreement to the proposed settlement or with his having no notice of, or effective opportunity to participate in, the proceedings. In the former case, the absent class member is not aggrieved by the approval of the settlement and so lacks Article

[8] *E.g.*, *In re Mego Fin'l Corp. Secs. Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (appellant "chose not to opt-out but filed objections"); *Hanlon*, 150 F.3d at 1019 (referring to appellants merely as "objectors"); *Class Plaintiffs*, 955 F.2d at 1286 (appeal by settlement class member and representative of a state-court certified class); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (appellants were defined to be, and received notice as, members of the plaintiff class); *but compare In re First Capital Holdings Corp. Fin'l Prods. Secs. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994) (dismissing appeal by class member who suffered no injury redressable by reversal of the challenged attorney-fee award), *with Lobatz v. U.S. West Cellular*, 222 F.3d 1142, 1146 (9th Cir. 2000) (determining that objecting class member had standing to appeal attorney-fee award).

[9] The Rules contemplate opportunities for members "to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." FED. R. CIV P. 23(d)(2) (emphasis added). Rule 23(b)(3) class members must be permitted to "enter an appearance through counsel." FED. R. CIV. P. 23(c)(2)(C) .

III standing.[10] In the latter case, the class member may collaterally challenge the binding effect of the decision as to him. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that decree in previous representative action could not preclude landowners not named as parties nor in privity with any who were).

Objection to a proposed settlement identifies the class member as aware of, and opposed to, what is proposed and simultaneously confirms him as one aggrieved by the order or judgment under consideration. Actual participation in the proceedings to consider the settlement effectively terminates any option to challenge the judgment approving the settlement other than on direct appeal. *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (barring relitigation of claims resolved by class settlement).[11] Although not strictly necessary for standing,[12] objection names the class member, removes any implication of consent, and makes him an actual participant. Thus, the Ninth Circuit has described objection as sufficient for class members to appeal from settlement decisions.

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[10] *Cf. Slaven v. American Trading Transp. Co.*, 146 F.3d 1066, 1069-70 (9th Cir. 1998) (holding that appellant defendant waived earlier objections to plaintiff class settlement with another party, ending its right to appeal from the settlement's approval).

[11] *Cf. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*, dismissing writ of certiorari as improvidently granted) (holding that members' collateral challenge to settlement class certification was precluded by *res judicata* after unsuccessful objections and direct appeal by other class members).

[12] As put succinctly by Judge Easterbrook: "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc.*, No. 01-2311, 2001 U.S. App. LEXIS 27164, *7 (7th Cir. Dec. 26, 2001).

Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000) (a class member may appeal the attorney-fee award if he "files an objection in district court to the amount of attorneys' fees requested in a class action settlement under Rule 23 ...."); *Silber v. Mabon*, 957 F.2d 697, 700 (9th Cir. 1992) (a class member may challenge the adequacy of the settlement notice procedures after he missed the opt-out deadline, if he appeared in the district court and objected to the notice).

The Fourth Circuit applies similar standards of affected interests and actual participation to allow nonparty appeals. *See Scardelletti*, 265 F.3d at 206 n.13 (citing exceptions made in "the non-class action context").[13] In reviewing Petitioner Devlin's appeal from a post-judgment order enjoining all class members from pursuing in other forums any issues encompassed by the settlement, *id.* at 210-13, it tacitly followed its established practice of permitting appeal by addressees of an injunction regardless of their "party" status.[14] The majority in *Scardelletti* nonetheless chooses to jettison the usual principles of standing to treat an objecting class member as less than a nonparty:

> [M]erely requiring unnamed class members to object to the settlement as prerequisite to their right to appeal does not adequately protect concerns about effi-

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[13] The majority in *Scardelletti* describes an exception for nonparties who have an interest in the cause litigated and have participated sufficiently "'to make [them] privy to the record.'" *Id.* at 206 n.13 (quoting *Davis v. Scott*, 176 F.3d 805, 807 (4th Cir. 1999)).

[14] *See, e.g., R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir.) (holding that those to whom preliminary injunction was directed had standing to challenge the injunction on appeal), *cert. denied*, 528 U.S. 825 (1999).

> ciency and effective class management because if the district court does not agree with the objections of the unnamed class members, it will proceed to approve the class settlement. Allowing appeals from each unnamed class member after approval of the class settlement implicates the precise management and efficiency concerns with which the class action system is concerned.

Id. at 209. It is a procrustean solution to make class settlement manageable by cutting off protections for class members. If according class members appellate rights equivalent to those of participants in non-class litigation makes a class settlement unmanageable, then the class should not be certified and the settlement should not be approved.

The choice of intervention rather than objection as the prerequisite for an appeal, *id.* at 208-210,[15] is unsupported by the Rules and leads to further error. First, intervention is over- and under-inclusive in identifying appropriate appellants to challenge a class settlement. In the Rules, intervention is designed as a voluntary means for an interested person to enter the action on her own motion and supplement the subject matter of the litigation. *See* FED. R. CIV. P. 24.[16] The

[15] The Ninth Circuit has never held that a class member must (or should) intervene in order to appeal from the approval of a settlement. *Powers*, 229 F.3d at 1256, expressly holds that intervention is not necessary for a settlement class member to appeal the attorney-fee award.

[16] A motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c).

function for intervention mentioned in Rule 23 is similarly to "present claims or defenses," FED. R. CIV. P. 23(d)(2) , whether applicable only to the intervenor or to all or some of the other class members. Intervention does not signify that the movant considers the class representation to be other than fair and adequate,[17] and may be unrelated to any proposed class settlement. In contrast, objection focuses on the settlement under consideration, reacting to matters raised by others. Objectors also are free to articulate challenges that might be waived by (or inconsistent with) a request for intervention, such as defects in jurisdiction.[18]

Second, restricting appeal to those class members entitled or actually permitted to intervene risks insulating class settlement approvals from review. If the court assesses the settlement to be fair, it is unlikely to determine that the class has been inadequately represented with respect to that settlement or that there is

[17] Only intervention pursuant to Rule 24(a)(2) requires that the movant's interest not be adequately represented by existing parties. *See also* FED. R. CIV. P. 23(d)(2) (listing in the disjunctive opportunities for class members "to intervene and present claims or defenses" and "to signify whether they consider the representation fair and adequate").

[18] This Court has held that the exercise of personal jurisdiction over absent plaintiff class members can be challenged on due process grounds. *Phillips Petroleum*, 472 U.S. at 811-12. A class member moving for intervention is affirmatively asking the court to exercise jurisdiction. On the other hand, a participant who limits himself to objections should not be deemed to have waived objections to jurisdiction. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 109-10 (1969) (appellant company — which was not named as a party, was never served, and did not formally appear at trial — challenged damage award and injunction entered after it had appeared specially and objected that the trial court was without jurisdiction over it).

any utility in permitting intervention. A rule limiting appeals to only those class members denied intervention "whose interests were not adequately protected by the class representatives," *Scardelletti*, 265 F.3d at 209, forecloses review of the fairness inquiry under Rule 23(e) and of the structural safeguards in Rules 23(a)(1)-(3) and 23(b), merely because the adequacy requirement of Rule 23(a)(4) has been met. Making merits review of class settlement determinations dependent on showing inadequacy is an error of similar magnitude to making settlement class certification "dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

Third, requiring intervention (or a showing that intervention was wrongfully denied) in order to appeal the merits of the settlement approval allows appellate review to be blocked because the motion to intervene is deemed "untimely." The Fourth Circuit determined that Petitioner Devlin's intervention after the settlement was proposed for preliminary approval "would have likely resulted in further delay and substantial litigation." *Scardelletti*, 265 F.3d at 203. Even if intervention at that point was untimely,[19] there is no finding that his objections to the proposed settlement were untimely or required any delay or expansion of the district court's consideration of the class settlement.

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[19] The *Scardelletti* opinion notes that Petitioner Devlin had earlier opportunities to participate in the conduct of the litigation or to supplement the efforts of the class representatives. 265 F.3d at 200 (original complaint named him as a representative of a defendant subclass); *id.* at 201 (through counsel, he informally requested intervention).

Petitioner Devlin is evidently a class member, and made objections to the proposed settlement that were heard by the district court. *Id.* at 201. After the district court rejected those objections, he sought direct review of that adverse decision. As an objecting class member, he should be entitled to appellate review on the merits of his challenges to the class settlement.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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